

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1977

No. 77 - 325

NASHVILLE GAS COMPANY,

Petitioner,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,

Respondent.

**PETITION FOR REHEARING BY
NASHVILLE GAS COMPANY
OF DENIAL OF WRIT OF CERTIORARI**

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November 11, 1977

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**CERTIFICATE OF COUNSEL
PURSUANT TO RULE 58 2**

I, Wm. W. Bedwell, hereby certify that the attached Petition For Rehearing is presented in good faith and not for the purpose of delay. I further certify that such petition for rehearing is restricted to the grounds specified in Rule 58 2 of the Rules of the Court, particularly arguments and issues raised for the first time in briefs opposing grant of writ of certiorari filed by other counsel in the case.

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Counsel for
Nashville Gas Company

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Pursuant to Rule 58 2 of the Rules of the Court, Petitioner Nashville Gas Company ("Nashville") petitions the Court to grant rehearing of the Court's October 17, 1977 denial of Nashville's Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee. In support hereof, Nashville, shows as follows.

BASIS OF PETITION

The Court acted prior to the time Nashville was able to get filed its brief in reply to the briefs in opposition. Nashville believes that the Court may have been misled by certain arguments first raised in the briefs in opposition to grant of the writ, filed by the Tennessee Public Service Commission

("TPSC") and Congressman Clifford Allen ("Allen"). Nashville prays that the Court take into consideration the replies to such arguments herein contained.

THE DECISION BELOW IS A FINAL DECISION

The most serious erroneous contention in the briefs in opposition filed by TPSC and Allen, and the major one which Nashville believes may have seriously misled the Court, are the arguments that the decision below is not final. Both TPSC's (p. 3) and Allen's (p. 3) briefs in opposition quote certain language of the Tennessee Supreme Court (appearing at App. p. A-28) as follows:

"The decree of the Chancellor in this case is reversed insofar as it dealt with the parent-subsidary relationship, and this cause will be remanded to the Chancery Court with directions to refer it to the Commission for the production by the Nashville Gas Company of the information ordered to be supplied by the Commission, and further consideration by the Commission after the information has been supplied." (Emphasis added)

At pp. 3 and 4 of its brief in opposition, TPSC argues that, "The decision of the Tennessee Supreme Court merely ordered Nashville Gas to file the information which the Public Service Commission found necessary." In support of such statement, it further quotes language of the Tennessee Court (appearing at App. p. A-27) as follows:

"The Commission felt, however, that it did not have enough information about proper contracts, depreciation schedules, historical costs, and the like, to determine the extent to which the industrial sales of the parent should be taken into account in fixing appropriate rates for the subsidiary. *We cannot, therefore, at this time know what significance, if any,*

the Commission will ultimately give to the data which is requested, but we believe that the Commission was entirely justified and acting within its jurisdiction in taking these into account." (Emphasis added)

At page 4 of its brief in opposition, TPSC argues:

"As this Court is well aware from its consideration of utility rate matters, many complicated questions and issues can arise in determining revenues, expenses and investments of public utilities. Such will surely be the case in the instant proceeding on remand to the Tennessee Public Service Commission. An additional question will be the proper allocation of revenue, expense and investment of the parent company, Tennessee Natural Gas Lines, Inc., between that company's interstate operation as regulated by the Federal Power Commission, and its *direct industrial sales not regulated by the FPC. Any or all of these questions could result in further appellate proceedings and could conceivably result in further appeal to this Court.*" (Emphasis added)

Standing alone, the language of the Tennessee Supreme Court quoted by TPSC and Allen would substantiate the conclusion such parties draw therefrom. In its Petition For Rehearing in the Tennessee Supreme Court, at App. pp. A-6 and A-7, Nashville pointed out that the quoted language of the Tennessee Court indicated that such Court felt that it was dealing only with the question of the right of TPSC to require the production of information.

Nashville would point out to the Court that the above findings have overlooked what the Commission required by its order. The Commission did more than order that such information be furnished. The real crux of the order, and that portion to which objection is raised, is the requirement in the order that Nashville's rates be reduced by imputing to it the revenues, expenses and investment associated with the sale of gas by its parent company. The Commission specifically ordered:

"4. That the Nashville Gas Company is hereby ordered to file with this Commission a proposed tariff which will produce additional annual revenue not to exceed \$1,147,044.00 *less the effect of imputing to Nashville Gas Company the revenues, expenses, and investment associated with the sales of gas by its parent, Tennessee Natural Gas Lines, Inc., to the three industrial customers within Nashville Gas Company's certificated area.*" (Emphasis added)

Based upon the above Commission order, the furnishing of the information is moot. The imputation adjustment is required to take place automatically, which act Nashville contends results in the unlawful confiscation of its property in violation of the Fourteenth Amendment and an infringement upon the commerce clause of the United States Constitution. These constitutional requirements, as prescribed and interpreted by this Court, declare that there must be a segregation of interstate and intrastate costs and revenues and further require that a company's property cannot be taken without due process of law.

The only question left open on remand to the TPSC will be minor mechanical details of imputing the parent company's net income from interstate commerce to the intrastate subsidiary. The requirement that such imputation take place is not open. It has been decided. Were Nashville to attempt to take an appeal on such issue after further TPSC action on remand, it would obviously be met with the claim by the same parties that such an appeal is barred by both the doctrines of *res judicata* and "law of the case."

The foregoing is fully demonstrated by the June 22, 1977 Order of the TPSC set forth at App. pp. A-141 through A-145. In such order, the TPSC dismissed a rate filing by Nashville subsequent to the one involved here on the ground that such filing did not reflect the imputation of the parent company's net revenues from interstate commerce to Nashville, the intrastate subsidiary.

OTHER ERRONEOUS CONTENTIONS BY TPSC

A. Claim That Nashville's Parent Company Has Manipulated Markets

At pp. 7-15 of its brief in opposition, TPSC re-argues the issue that there was impropriety in Nashville's parent company making the sales to the three industrial customers in question rather than such sales being made by Nashville. At page 7 of its brief in opposition, TPSC quotes from its order reviewed by the Tennessee Supreme Court as follows:

"We believe this information is material and necessary if we are to meet our statutory responsibility of setting just and reasonable rates for Nashville Gas company. It is our position that the Nashville Gas Company should have acted toward its parent as it would have to an outside company when the decision was made by Tennessee Natural Lines to serve these three customers located within the certificated area of Nashville Gas. A policy of selecting profitable customers by the parent and less profitable customers by Nashville Gas company cannot result in the setting of just and reasonable rates for Nashville Gas Company unless and until the Commission has sufficient information to determine what rates would be required by Nashville Gas Company if it, instead of its parent, were serving these three customers. App. p. 132." (Emphasis added)

Both reviewing courts below specifically found that there had been no impropriety involved in such sales being made by Nashville's parent rather than by Nashville. The Tennessee Supreme Court stated at two separate points in its opinion that such was not the case:

"...because of certain statements and comments made in the briefs and in the record, we feel constrained to state that we find no evidence whatever of any misconduct, illegality or impropriety in any of

the management decisions and transactions which are reflected in this record." (App., p. A-23)

and again:

"There is no question but that the two companies have had in the past separate historical development, and we have already stated that we find no illegality whatever in the management decisions which resulted in the present situation." (App., p. A-26)

The reviewing courts below necessarily reached such conclusion. The only *evidence* in the record on such point showed that such was not the case. The only thing in the record which might be claimed to substantiate the same are numerous statements and charges of *counsel* for TPSC, totally contrary to the only evidence on the point.

As shown in Nashville's Petition For Certiorari, Nashville's parent could not undertake the three sales in question without first obtaining a certificate of public convenience and necessity from the Federal Power Commission. As further shown in Nashville's petition: such certificate could only be issued upon an affirmative finding by the federal commission that such sales were required by the public convenience and necessity; that, included within the issues contained in the proceedings before the federal commission, was the question of whether the specific sale involved should be made by the interstate applicant or by some other company, including a customer of such interstate company; that the TPSC had full opportunity to participate in the proceedings before the federal commission and to attempt to show that the three sales in question should be made by Nashville rather than by Nashville's parent company; and, that TPSC did not do so and has never raised such issue from the time such sales commenced in 1950 until the present proceeding, approximately 25 years.

B. Claim That TPSC Action Is Necessary In Order To Treat Sales Made By Parent As If Made By Nashville

As noted in the preceding subsection, at page 7 of its brief in opposition, TPSC quotes from its order reviewed herein by the Tennessee Supreme Court, wherein the TPSC stated:

"... A policy of selecting profitable customers by the parent and less profitable customers by Nashville Gas Company cannot result in the setting of just and reasonable rates for Nashville Gas Company unless and until the Commission has sufficient information to determine what rates would be required by Nashville Gas Company if it, instead of its parent, were serving these three customers." App. p. 132.

In its petition for certiorari, Nashville showed that the TPSC order upheld by the Tennessee Supreme Court usurped federal authority. The argument in TPSC's brief in opposition and the above quotation further substantiate such usurpation.

The federal commission vested with jurisdiction specifically and separately found that each of the three sales in question were required by the public convenience and necessity to be made by Nashville's parent company, not by Nashville. TPSC admits that its purpose is to achieve the result of such sales "*as if*" they were made by Nashville. In addition to the other usurpations of federal authority shown by Nashville in its petition for certiorari, the effect of the admitted purpose of TPSC is to void the various separate findings and orders of the federal commission.

C. Claim That The Sales Involved Are Not In Interstate Commerce

In its petition for certiorari, Nashville showed that the action of TPSC, affirmed by the Tennessee Supreme Court, was totally contrary to consistent holdings by this Court on several points, including the contention that the sales by the parent in question are not made in interstate commerce. In its brief in opposition,

TPSC continues to claim that such sales are not sales in interstate commerce because the federal commission is specifically deprived only of jurisdiction to regulate the rate at which such sales are made. If the Court does not grant certiorari in this case, such argument is only one of the many far-reaching reversals of prior consistent holdings by this Court for which this case will be cited as precedent.

CONCLUSION

Nashville renews the showings in its petition for certiorari that: the order of the TPSC, affirmed by the Tennessee Supreme Court, is directly contrary to consistent holdings by this Court on various constitutional and other federal questions; that federal and constitutional law is all that is involved in this case; that such action will have a serious and far-reaching deleterious impact upon interstate commerce; and, that such action is nothing but a sham and subterfuge in an attempt to justify denial of Nashville's, its parent's, and their respective debtholders' constitutional rights.

WHEREFORE, Nashville urges the Court to grant the writ of certiorari petitioned for.

Wm. W. Bedwell

Respectfully submitted,

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November 11, 1977

NASHVILLE GAS COMPANY

CERTIFICATE OF SERVICE

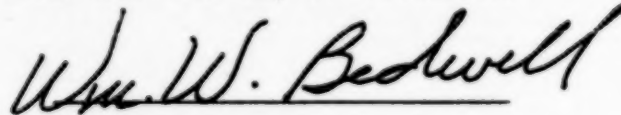
I hereby certify that I have this day served the attached Petition for Rehearing upon all parties required to be served by depositing in the mail, air mail postage prepaid, three (3) copies thereof to counsel for all parties before the Supreme Court of Tennessee, addressed as follows:

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Dated at Washington, D.C. this 11th day of November,
1977.



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